2001 STATE BAR OF CALIFORNIA ENVIRONMENT SECTION
NEGOTIATION COMPETITION FACT PATTERN

Lumber Land Inc. ("LLI") has operated California's only particle board manufacturing plant in Hagenville in the eastern part of the state since 1970. LLI manufactures particle board from sawdust and wood shavings trucked to Hagenville from saw mills throughout a several state region. The Hagenville plant, which uses hundreds of thousands of tons of the saw mill byproducts annually, is an aging operation, operated for the same purpose by other lumber companies before LLI purchased it in 1970. Currently, the operation is only marginally profitably for LLI.

The Hagenville plant operations are located on several acres and consist of a complex of buildings, including the "new shavings" building where sawdust and shavings are stored, and the manufacturing building to which the sawdust and shavings are transported using both trucks and a pneumatic piping system. (See map). The east side of the property is a parking lot. On the west, the manufacturing site is bounded by a pond, now on County land, that was once used to store logs, but now has no apparent use. Much of the pond is now filled; there is some dispute as to whether the shrinkage of the pond is the natural result of the drainage of an artificial pond or the result of sawdust releases into the pond from the particle board manufacturing operation. The North Fork of Pauls Creek runs also runs for some distance along the west of the property and is then routed under the parking lot and into a channel bordering the eastern portion of the property. The area surrounding the plant is industrial, including lumber operations on both the north and south sides that also border the pond area.

After receiving a complaint of sawdust discharge to Pauls Creek from the City of Hagenville, Fish and Game Warden Teri Filter inspected the facility on seven separate occasions in 1999 and 2000. Filter found large quantities of sawdust in and adjacent to the Creek. She traced the sawdust to both the new shavings building and the manufacturing building and, most clearly, to a large, uncovered pile of sawdust located on the asphalt parking lot forty feet from the Creek. During her visits, Filter observed that sawdust was transported all over the property by wind from both buildings and the parking lot pile, from the wheels of large equipment used to move the sawdust from the shavings building to the manufacturing building, from two off-loading sites for semi-tractor/trailers bringing the sawdust to the plant and off-loading it to the parking lot pile, and through holes and gaps in the pneumatic transport tubing from the shavings building to the manufacturing building. The ground adjacent to the Creek was covered with loosely compacted sawdust to a depth ranging from a few inches to over a foot. Filter observed sawdust on the entire length of Pauls Creek where it runs adjacent to the LLI property, coating the bottom and banks of the Creek, and extending downstream.

During Warden Filter's visits in April 2000, she directed LLI plant personnel to stop sawdust from entering the Creek. LLI personnel stated that they would implement a program to halt the release of sawdust within two weeks. At the same inspection, Warden Filter observed large amounts of sawdust on the roof of the manufacturing building and that the wind was blowing the sawdust from the roof into the Creek. Warden Filter returned a month later and found that conditions had not changed: the parking lot pile was larger than before and remained uncovered; all other sources of sawdust, including trucks, off-loading areas, the roof, the pneumatic tube, and the parking lot continued to contain substantial quantities of sawdust. During her review of documents, Filter found that the City of Hagenville, and various state and local agencies had discussed sawdust contamination of Pauls Creek with LLI during the past four years. Warden Filter filed her report with the Farmer County District Attorney's Office.

The D.A., after reviewing the matter, filed a massive 120 count criminal complaint against LLI, alleging multiple days of violations of Ca. Fish and Game Code §5650, Health and Safety Code § 42400.2(a), and Water Code § 13376**,** seeking fines and restitution for the resources. The criminal fine, based on the allegations, could total tens of millions of dollars. After the criminal complaint was filed, Warden Filter found what she believes to be an additional, serious violation. Particle board "pressing" processes in the plant generate air emissions of very fine particulates from press vents on the roof top every four minutes, twenty-four hours a day. Based on preliminary review, Warden Filter believes that these emissions have been occurring for years. Warden Filter experienced eye and breathing irritation while inspecting the logging pond, and also believes that the particulate matter has filled the former logging pond and has extensively coated the ground surface and vegetation in the area, resulting in a layer of sawdust/particulates several inches deep on the ground. LLI has a permit for the releases of particulate into the air from the local Air Quality Management District.

For its part, LLI acknowledges that it must improve it general housekeeping to reduce the escape of sawdust. It does not believe, however, that the alleged violations should be charged criminally, or that releasing sawdust to an artificially created logging pond constitutes a violation of F&G Code § 5650 or any other statute. With respect to air emissions, the plant has a permit. Finally, while sawdust release may have impacted Pauls Creek and the logging pond to some extent, LLI believes it can demonstrate that most of the impacts observed by Warden Filter are the result of long-standing practices by other industrial entities in the area and LLI's predecessors at the site. LLI also believes that the logging pond is not being filled in by sawdust; rather the pond is an artificially created pond that is now draining naturally. Most importantly, with respect to the pond, LLI believes that it is not a "water of the state," because it was artificially created, and is therefore not covered by the various statutes.

LLI has expressed interest in working with the DA to resolve the matter, but only if the DA will discuss civil compromise of the criminal case, (i.e. resolving the criminal matter through a civil settlement). LLI wrote a letter to the DA requesting a discussion of civil compromise and specifically acknowledging that the discussion of a civil compromise was at the defendant's request and therefore did not constitute an attempt by the DA to use the criminal filing as an attempt to obtain an advantage in a civil case. After evaluating the request, the DA determined that a civil compromise could be acceptable if it addressed three elements: actions to halt the releases of sawdust, restoration of the logging pond and Pauls Creek, and significant monetary penalties. The parties (the DA and LLI) agree to first address the issues surrounding the release of sawdust, and then proceed to restoration and penalty issues.

The DA believes that it has a very strong case, although he is concerned that in his county, where logging is important to the economy, the court and any jury will not believe that putting sawdust in a creek and pond is a major offense that should subject a company to huge fines. The county has no substantial history of environmental enforcement cases, and the court and community are not used to such cases.

LLI, for its part, has a series of problems. LLI believes that it has substantial defenses to most of the allegations, but it cannot afford to lose a criminal case. As the result of an unrelated plea bargain in a criminal case in another state, it could be barred from federal contracts if it has a further criminal conviction. (Under some federal statutes, facilities that commit multiple criminal violations of environmental or other laws are barred from obtaining federal contracts.) On the other hand, the Hagenville facility is only marginally profitable. If the costs of a settlement appears to be too high, LLI may be forced to roll the dice and defend the case in court.

The DA has informed LLI that it expects LLI to take all measures necessary to comply with F&G Code § 5650. Since § 5650 makes it "unlawful to deposit in, permit to pass into, or place where it can pass into the waters of this state," *inter alia*, "sawdust, shavings, slabs, or edgings," or "substances or materials deleterious to fish, plant life or bird life," there is some dispute between the DA and LLI as to what would constitute compliance with that section. The DA and LLI have agreed that the following matters need to be addressed by LLI. Preliminary discussions have identified and narrowed the issues:

1. Outside sawdust pile. LLI agrees that the pile must be covered, fenced and controlled. LLI needs to have the pile uncovered at times during the day as trucks bring in sawdust from sawmills and when sawdust is moved from the pile to the sawdust intake point. LLI agrees that overnight storage should be indoors. The DA seeks the end of all use of the uncovered outdoor pile.
2. Use of front loaders to move sawdust. Driving front loaders across the parking lot generates fugitive sawdust. LLI agrees to switch to use of trucks (loaded at the site of the sawdust pile by front loaders and unloaded at the sawdust intake point), but the timing of the switch will impact cost.
3. Press vent releases from roof. The DA wants the vent releases enclosed, but such a structure would have to be massive and expensive and would interfere with operation of the vents. Without the enclosure, some release of sawdust from the vents is inevitable.
4. General maintenance on ground and on roof. LLI agrees that this is necessary and appropriate. The question is how often and to what extent.
5. Inspections. LLI also agrees to self-inspect. The DA wants to mandate that LLI conduct inspections of the pneumatic tubes, the parking lot area, the outdoor piles, the loading area, and the roof during each of the three daily eight hour shifts. LLI believes that number of inspections is too many, too expensive, and unsafe.

LLI has agreed to make specific proposals with respect to each of these matters at the outset of the first settlement meeting (which will be Round I of the competition). LLI has made it clear that its chief concern is whether it can operate the plant at a profit. If it cannot, LLI has stated that it will shut down, eliminating dozens of jobs, as well as a production process that recycles thousands of tons of sawdust from saw mills throughout a several state region. LLI's second concern, of equal importance, is its desire for certainty in any resolution of its potential liability. It does not want this operation to be subject to changing agency standards regarding what constitutes deleterious releases of sawdust.

The DA wants the plant to continue to operate, but not if it harms the environment. While, realistically, no one can ensure zero release of sawdust, the DA wants to get as close to this level as he can, and to have a mechanism for enforcement in the settlement that would permit additional action if significant sawdust release continues. While the DA believes that LLI's threat to shut down is hollow, closure would be a big blow to the county and to the DA politically.

Neither party knows for certain whether the control measures LLI proposes will be sufficient. Thus, perhaps the most difficult issue to resolve is how to allow LLI to operate its plant with some certainty that it will not face an unreasonable threat of further enforcement action, while ensuring that the DA continues to have enforcement authority if he believes that the measures taken by LLI have been insufficient to protect the environment and public health. Both LLI and the DA have agreed to explore options to resolving this issue at the settlement meeting.

The parties face two additional issues that they have agreed to try and resolve in a separate settlement meeting (which will be Round II of the Competition). The DA seeks substantial penalties for what the DA believes has been years of illegal sawdust releases. Civil penalties under F&G Code § 5650 alone ($2,500 per day per violation) could be astronomical, considering the press vents release every four minutes. The DA recognizes, however, that this is a rural county that relies heavily on the timber industry, and that the courts are not used to environmental enforcement cases. The DA is concerned that violations relating to sawdust released into a former logging pond and an urban creek might not result in a large penalty following trial. On the other hand, the DA believes he can establish that LLI has blatantly ignored specific demands to cease its actions and has severely polluted the creek and pond.

LLI views the facts differently. As noted above, LLI believes that the logging pond is not covered by the statutes, as it was artificially created. LLI has also evaluated historical uses of the area near the creek and pond and determined that dozens of other industries, many of them in the timber business, have operated in the area. LLI has no doubt that these businesses contributed substantially to any contamination found in the Creek, and were in fact primarily responsible for the current conditions. LLI does not believe that it is fair for it to bear the lion's share of restoration costs. LLI believes that the other businesses should contribute to these costs and that the DA should obtain those contributions.

The DA also seeks restoration of the pond and creek as well as natural resource damages, contending that , artificial or not, the pond is covered by the relevant statutes, and LLI is responsible for the contamination. The Department of Fish and Game has completed a preliminary natural resource damage analysis pursuant to state law authority for recovery of such damages (see, e.g., Fish and Game Code §§ 12015 and 12016) and has determined that the degraded North Fork area of Pauls Creek and the logging pond have significant resource values. Upper Pauls Creek supports populations of salmon and is a fairly pristine ecosystem. The degraded North Fork portion, however, supports almost no aquatic life other than algae. Sample results show significant levels of tannins, lignins, and formaldehyde in the creek downstream from the LLI plant, but not upstream, as well as in the pond near the plant. Tannins and lignins are breakdown products associated with wood processing, and formaldehyde is a waste product of particle board manufacturing. LLI contends that the substances are, at least primarily, from other industrial and mill-related operations in the area, and that the tannins and lignins are from historic use of the logging pond, which has hydrologic connections to the creek. The DA, based on information from DFG scientists and the pattern of the sampling results showing higher levels near the plant and lower levels downstream, believe that LLI's connection to the degradation of both the pond and creek can be clearly established.

DFG has conducted a "back of the envelope" damage assessment of the value of injury to Pauls Creek and

the logging pond from the sawdust ("back of the envelope" to get a very rough approximation of wha the value might be). Because of the difficulty of assigning dollar values to "non-market" resources, DFG used a habitat equivalency approach (referred to as a "HEA"). For an example of habitat equivalency analysis or HEA, see the description of the settlement at the United Heckathorn National Priority List Site, at 65 Fed. Reg. 10815 (February 29, 2000).

DFG has conducted a cursory survey of the pond and determined that the habitat along its banks has been degraded by sawdust from the particleboard plant (and possibly as the result of sawdust and contaminants from other nearby facilities). The pond has also been reduced in size in recent years, either from the large volume of sawdust, or a reduction in the volume of retained water. DFG engineers believe that actual restoration of the pond would require substantial dredging, at an estimated cost for dredging and disposal of $500,000, with an additional $100,000 for cleanup and habitat enhancement along the pond's banks. However, the engineers are uncertain about the viability of the pond, even if dredged, because of questions about whether the water would drain away under natural conditions. An engineering study to determine the long-term viability of the pond, if restored, and the best alternative for restoration of shoreline habitat would cost approximately $50,000. If the restored pond would not be viable in any event, the lost use value for the pond is probably relatively low. If the restored pond is viable, there is a basis for substantial "lost use" value based on the loss of substantial ecological value, particularly as habitat for endangered species such as the red-legged frog, and for migratory birds. The dollar cost of habitat enhancement in the area of the pond that would provide equivalent ecological services would likely be on the order of $100,000.

DFG has also looked at restoration of the creek, and at potential projects along the creek that might serve to replace the ecological services lost due to the contamination. Again, some removal of accumulated sawdust would be required to permit the creek and its riparian habitat to recover. The DFG cost estimate for that work is $375,000. Once the removal is complete, the creek is likely to take about three years to fully recover from the impact of the sawdust and the removal activities. DFG has looked into the possibility of riparian enhancement up and down stream from the facility. The upstream area is largely pristine and there is little that could be done to enhance its value. Some downstream areas are degraded, and could be restored and/or enhanced to provide services equivalent to the estimated lost use at an estimated cost of $250,000.

LLI strongly disagrees with the analysis. LLI points out that the creek runs through a heavily industrial area and along a heavily used road, and that its channel has been substantially altered by the companies bordering the creek. LLI contends that the logging pond was artificially created and that it has naturally drained away. LLI believes that the pond should be given no natural resource value at all. For a discussion of natural resources damages (?) under analogous federal law provisions, see generally, *General Electric v. U. S. Dept. of Commerce*, 128 F.3d 767 (D.C. Cir. 1997); *California v. Montrose Chemical*, 104 F.3d 1507 (9th Cir. 1997); O'Conner, Craig, "Natural Resource Damages under CERCLA and OPA," in American Law Institute–ABA Continuing Legal Education Series, SD 67 ALI-ABA 145 (available on Westlaw).

The DA has informed LLI that the case can be resolved civilly only if LLI agrees to (1) a significant monetary penalty, (2) natural resource damages in the form of substantial restoration actions and/or money damages, and (3) injunctive relief that would assure no future violations. The DA has informed LLI that it seeks:

(a) $1,000,000 in penalties (based on *civil* claims under Fish and Game Code § 5650 et seq., and 1603.1, Health and Safety Code § 42402, and Business and Professions Code § 17200); and

(b) $1,375,000 for the restoration of the creek and pond and natural resource damages (combined).

LLI has stated that the DA's demands are way out of line for resolution of the case.

Preliminary Rounds:

The parties have agreed to two separate settlement discussions, which will constitute the first two rounds of the competition.

In Round I, you will represent one party in the dispute, either the District Attorney or LLI, and negotiate against the opposing party. You will attempt to resolve issues concerning releases of sawdust from the site along with future enforcement criteria.

In Round II, you will represent the same party in the dispute, and negotiate against a different team representing the opposing party. You will negotiate about a second set of issues, namely penalties, restoration, and natural resource damages. (Note, natural resource damages are generally sought on behalf of the state. DFG, a state agency, has requested in this case that the DA recover those damages). For purposes of the competition, the resolution of the second set of issues is independent of how the issues in Round I were (or were not) resolved.

Final Round:

Four teams will be selected to advance to the Final Round of the Competition. There will be two simultaneous negotiation sessions. Each team will be randomly assigned to represent one party in the dispute, either the District Attorney or LLI, and will negotiate with the opposing party about a new set of issues, based on the same factual situation underlying the morning negotiations. Each team will be provided with a new set of confidential negotiating instructions. Since the final round involves new issues and new confidential instructions for all parties, there will be no advantage or disadvantage to representing the same or a different party than the one represented in the first round.

2001 ENVIRONMENTAL NEGOTIATIONS COMPETITION
CONFIDENTIAL INSTRUCTIONS FOR DEPUTY DISTRICT ATTORNEYS
ROUND 1

The DA must rely to a large extent on LLI's assessment of the effectiveness of its proposals (and, of course, common sense) regarding improvements in the control of sawdust releases at the plant. The DA, however, wants the agreement to have as much specificity as possible as well as a mechanism permitting easy enforceability should the implemented measures prove ineffective.

With respect to the housekeeping issues raised in the background discussion, the DA has given you some specific instructions:

1. Outside sawdust pile. The DA would like to have no daytime outside pile, but recognizes that this would make it difficult for LLI to operate. All piles must be covered if not in active use day or night, and the area must be fenced with material that will contain the sawdust that may be released.

2. Front loaders. The DA believes that a large company like LLI should be able to bring in trucks almost immediately, without incurring any inordinate expense.

3. Press vents. This is a tough issue. Some structure should be created to limit air emissions from the roof vents. The DA is willing to compromise on the specifics as long as he retains the ability to demand alternative solutions if the compromise solution fails to sufficiently reduce emissions.

4. General maintenance. The more the better, every shift if possible. The more accountability the better as well. Name in the settlement agreement the individuals responsible for maintenance activities.

5. Inspections. Again, the more the better. Inspections should be logged, along with problems identified and actions taken. This could make it easier for the DA to enforce the agreement.

* 6. Enforcement and Additional Measures. The DA believes that these issues should all be resolvable if both sides compromise. The more difficult problem is what happens if the "solutions" are insufficient? Is there some way to allow new or modified solutions? LLI probably should not be punished if it meets its new obligations, but the DA needs some recourse if the measures agreed on now prove insufficient. Also, some conduct should still be subject to enforcement action (e.g., additional civil penalties, criminal sanctions) by the DA. If you can resolve these problems, the DA will support an agreement.

2001 ENVIRONMENTAL NEGOTIATIONS COMPETITION
CONFIDENTIAL INSTRUCTIONS FOR LLI ATTORNEYS
ROUND 1

Your goals are threefold: save the company money, ensure certainty of obligations at this plant for the future, and resolve the matter civilly (the pending criminal case is a big threat to the company's operations elsewhere as well as at this facility). Because of LLI's corporate policy, almost all costs will be borne by the Hagenville Plant, not by the corporation generally, so you have a strong incentive to keep costs low.

With respect to the specific housekeeping issues, you have more expertise that the DA and you believe you can demonstrate that the following steps will be adequate:

1. Outside sawdust pile. The DA would like to have no daytime outside pile, but this would make operations difficult. The piles can be covered when not in use, and fenced. The sawdust can be inside at night, but LLI needs an emergency exemption for overnight outside storage: sometimes the particle board plant must be shut for emergency repair, and sawdust from mills continues to arrive.

2. Front loaders. Bargain for some time for implementation to reduce costs.

3. Press vents. This is a tough issue. A full scale covering would be expensive and LLI believes it would not in fact be effective. A four-sided fence with cloth sides and no top would be less expensive and would contain some of the emissions. Note that the company currently has an air emissions permit that allows these emissions, and the permit does not require any covering.

4. General maintenance. LLI agrees that it needs to pay more attention to housekeeping. Once or twice a day maintenance of the parking lot could help and would be acceptable. The roof is a different problem. Working on the roof is dangerous at all times, but particularly in the dark. Once a day inspection/maintenance is the maximum that we should consider for the roof.

5. Inspections. We will do inspections, but once a day should be more than enough.

* 6. Finality. LLI believes these issues should all be resolvable if both sides compromise. The more difficult problem is can LLI rely on these solutions? Some release of sawdust is inevitable. We do not want to be charged with violations again. The DA should agree that compliance with the actions agreed upon in this document will be sufficient. Without certainty, we cannot plan our operations with any certainty as to cost.

On behalf of LLI, you need to make an initial proposal for resolution of these issues in response to the DA's demands that will start off these settlement discussions in a positive way that you hope will lead to a good settlement for the company.

2001 ENVIRONMENTAL NEGOTIATIONS COMPETITION
CONFIDENTIAL INSTRUCTIONS FOR DEPUTY DISTRICT ATTORNEYS
ROUND 2

The key statutes under which the DA can proceed -- Fish and Game Code § 5650 and Business and Professions Code § 17200 – allow for, but do not require, the assessment of very large monetary civil penalties. In using their discretion in assessing penalties in environmental cases, courts apply several factors, which are often enumerated in the statutes themselves. Key among them are the extent of the company's deviation from the statutory or regulatory requirements, and the extent of the actual harm or the potential for harm from the violations. Other factors include the economic benefit to the company from its non-compliance, the willfulness of the company's actions, efforts by the company to comply with the legal requirements, the company's past history of compliance, its ability to pay a substantial penalty, the deterrent effect of the penalty on the company and others in the regulated community, and whether the regulatory agencies had historically acquiesced in the violations (i.e., they knew about the conduct but did nothing). In this case, the DA believes that he can establish that there was significant harm to public health and the environment, (although he acknowledges the artificial nature of the pond and the fact that the creek is located in an industrial area) and that the violations were clearcut and avoidable. The DA also recognizes that violations occurred for years without enforcement action by the regulatory authorities.

There has never been an environmental enforcement action of any significance in the county, so the DA does not know what monetary penalty to expect from a court, if liability is found. The DA wants to receive some money in penalties, but is willing to trade a significant amount of the monetary penalty to get restoration of the creek (in particular) and hopefully the pond as well. He also wants some additional money for damages (based on the natural resource damage theory), and would accept projects for resource enhancement for other parts of the creek upstream or downstream from the area directly impacted by the pollution (in addition to restoration of the harmed area of the creek). The DA knows that the natural resource damage analysis was done quickly and is something of an educated guess. Both parties know that, while a full-scale natural resource damage evaluation might produce a higher damage estimate, it could also be very costly to carry out. While LLI could be forced to pay the costs of the evaluation and the damages, the more complete assessment may not be justified by the ultimate result, so there is risk for both parties in that approach. The DA does not want to argue the specifics of the HEA analysis, except to say that the valuations are based on restoration costs for other projects in the area on other portions of the Pauls Creek and the cost of wetlands/pond projects. The DA is more comfortable with the estimates for costs of actual restoration of the pond and creek, but even these are estimates. This uncertainty may be a basis for some creative approaches to resolution of the case.

The DA requests that you consider very carefully an unusual aspect of this negotiation. Ordinarily, under Cal. Rules Professional Code, Rule 5-100, the DA cannot use the threat of criminal enforcement to obtain advantage in a civil case. Here, however, after the case was filed as a criminal matter, LLI requested discussion of civil compromise. The DA asks that you evaluate whether you can suggest in negotiations that LLI faces criminal jeopardy if the company fails to settle.

The DA would, if necessary, accept $600,000 for penalties and damages (or project money), plus restoration of the creek (estimated at $375,000). The DA would also like something for restoration of the pond– perhaps an evaluation of the costs of restoration with an agreement to pay costs up to a certain amount. While the DA will, if necessary, accept a $600,000 settlement for penalties and damage claims, plus restoration of the creek, the DA would consider it a disappointing result.

2001 ENVIRONMENTAL NEGOTIATIONS COMPETITION
CONFIDENTIAL INSTRUCTIONS FOR LLI ATTORNEYS
ROUND 2

The key statutes under which the DA can proceed -- Fish and Game Code § 5650 and Business and Professions Code § 17200 – allow for, but do not require, the assessment of very large monetary civil penalties. In using their discretion in assessing penalties in environmental cases, courts apply several factors, which are often enumerated in the statutes themselves. Key among them are the extent of the company's deviation from the statutory or regulatory requirements, and the extent of the actual harm or the potential for harm from the violations. Other factors include the economic benefit to the company from its non-compliance, the willfulness of the company's actions, efforts by the company to comply with the legal requirements, the company's past history of compliance, its ability to pay a substantial penalty, the deterrent effect of the penalty on the company and others in the regulated community, and whether the regulatory agencies had historically acquiesced in the violations (i.e., they knew about the conduct but did nothing).

LLI believes that the primary pollutant was sawdust, and that a jury in this county will not get terribly upset about sawdust released to water, and that any harm to the environment of the pond and creek is in fact the result of the activities of other companies, not of its practices. On the other hand, LLI recognizes that its practices have been sloppy and that its failure to address the sawdust issues at its plant could appear to be the result of indifference if not a negative attitude toward protection of the environment.

LLI will agree to do restoration work on the creek. It does not want to do work on the pond, but could agree to fund a study to determine what it would cost to restore the pond. If necessary, LLI is willing to agree to some contribution to pond restoration, as part the total cost of settlement. LLI believes that the DA's demand for $1 million in penalties and $1.375 million for damages and restoration costs cannot be justified on the facts, and would never be awarded by a court or jury in a county where there has never been an environmental enforcement case. LLI believes that the HEA analysis for natural resource damages could be easily attacked. LLI recognizes, however, that it has some real risk that a full scale evaluation of natural resource damages could be very costly and not necessarily reduce the damage estimate.

Faced with the DA's monetary demand, LLI would normally fight in court. Because of the potential for criminal jeopardy, however, LLI needs to resolve the matter. LLI seeks the cheapest solution that will completely resolve the issues in the case. The bottom line for LLI is that it will spend no more than $1,000,000 total for penalties and damages (in addition to restoration of the creek–which LLI believes it can do itself for approximately $100,000, and sawdust control measures agreed to earlier). LLI would prefer to pay a lower penalty and spend more money on resource enhancement projects in the greater Hagenville area. While $1 million is the bottom line, top LLI management would be unhappy if the total was that high.

Finally, LLI requested civil compromise of a criminal case. You should determine if Cal. Rules Professional Code, Rule 5-100 applies to the negotiations.